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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 306

RALPH SANTANA, LIONEL MARQUEZ, FRANK SERRANO, ELIZA ROSARIO, LILLIAN SANTANA,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the below-stated judgment and order of United States Court of Appeals for the Second Circuit.

A. The Opinion Below

There was no opinion below. A copy of the Court's order of May 2, 1966 is annexed hereto as Appendix A.

B. Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 2, 1966. Mr. Justice Harlan extended petitioners' time in which to file a petition for a writ of certiorari to July 1, 1966. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

C. Question Presented

The question specifically raised by the petitioners is:

I. Did the Court of Appeals for the Second Circuit abuse its discretion in denying the petitioners due process of law by dismissing their appeal?

D. Constitutional Provisions and Statutes Involved

Fourteenth Amendment to the United States Constitution and Rule 32d, Federal Rules of Criminal Procedure.

E. Summary Statement of Matters Involved

On October 28, 1965, the petitioners herein entered pleas of guilty and at that time, as indicated to the Court, a recommendation as to sentence would be made by the United States Attorney. On February 17, 1966, the petitioners came before the District Court for sentence and sentences in excess of the United States Attorney recommendations were imposed. The petitioners endeavored to withdraw their pleas of guilty and were not even permitted to so move.

On April 14, 1966, the United States Attorney moved to dismiss the appeals. Copies of the motion to dismiss dated April 14, 1966 and petitioners' affidavit in opposition dated April 28, 1966 are annexed hereto as Appendices B and C.

As may be observed from the papers submitted in opposition to the Court below, the petitioners simply sought time in which to make an orderly determination of which remedy to pursue, whether to move for a reduction of sentence, attack the plea, or to move by way of an appeal. All of the petitioners were incarcerated and no application for bail had been made on behalf of any one of them. All of the petitioners had pleaded to crimes which required mandatory minimum sentences.

F. Reasons for Granting Writ

I.

The Court of Appeals for the Second Circuit abused its discretion in denying the petitioners due process of law by dismissing their appeal.

For the Court of Appeals to have dismissed the petitioners' appeal after so brief a time was an abuse of discretion and not in keeping with the tenure of even handed justice administered in the Federal Courts. It was particularly unseemly for the United States Attorney to have moved to dismiss these appeals when it was his promise or representation which was the basis of the petitioners' complaint. It is not questioned that the United States Attorney made the recommendations which he promised to make, and while it is quite clear that the promise was stated as not being binding on the Court, it is equally clear

that a defendant in a criminal case is bound to give great weight to the assurance that the Attorney for the Government will make a recommendation. The question of the proper remedy and proper form is close and complex for counsel and the petitioners. Whether to proceed by collateral attack, by motion to reduce sentence or to seek appellate review of the fundamental fairness was not easily determined. No countervailing arguments relating to the expeditious administration of justice are validly present here. The petitioners were all incarcerated and no motion for bail pending appeal was made. What the petitioners sought was a full determination of the propriety of what had transpired. Since the Government was an active participant in prepleading discussions, it is strange indeed that the Government should on narrow grounds of time seek to avoid appellate review of the situation in which it was deeply enmeshed. Counsel for the petitioners has not indulged in this petition in mock appeals to legal erudition and scholarship nor the prolix citation of cases, because the issue here, it is respectfully submitted, is simply one of this Court's supervision over the fairness of the administration of justice in the Federal Courts. It is respectfully submitted that this Court's stewardship of the administration of justice in the United States Courts makes the granting of this writ proper and desirable.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Petitioners

APPENDIX A

Order of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of May, one thousand nine hundred and sixty-sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

RALPH SANTANA, LIONEL MARQUEZ, FRANK SERRANO, ELIZA ROSARIO, LILLIAN SANTANA,
Defendants-Appellants.

A motion having been made herein by counsel for the appellee to dismiss the appeals for lack of prosecution,

Upon consideration thereof, it is

Appendix A—Order of United States Court of Appeals

Ordered that said motion be and it hereby is granted and that the appeals from the United States District Court for the Eastern District of New York be and they hereby are dismissed.

A. Daniel Fusaro
Clerk

APPENDIX B

Notice of Motion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

64 CR 456

UNITED STATES OF AMERICA,

Appellee,

—against—

RALPH SANTANA, also known as Reuben Nova, "Red" Nova, Ralph Nova, and Rafael Salsano; LIONEL MARQUEZ, also known as "Chilli" Marquez; FRANK SERRANO; ELIZA ROSARIO, also known as Lisa Marquez; LILLIAN SANTANA, also known as Lillian Nova, Margie Moore and Lillian Lequerique,

Appellants.

SIR:

PLEASE TAKE NOTICE that the attached Motion to Dismiss Appeal will be presented to the United States Court of Appeals for the Second Judicial Circuit, pursuant to Rule 14 of this Court and Rule 39(c) of the Federal Rules of Criminal Procedure, for the reasons therein stated, on the 2nd day of May 1966, at 10:30 A.M. or as soon thereafter as counsel may be heard at the United States Courthouse, Foley Square, New York, New York.

Appendix B—Notice of Motion

Dated: Brooklyn, New York
April 14, 1966.

JOSEPH P. HOEY
United States Attorney
Eastern District of New York
Attorney for United States of America

By: RAYMOND BERNHARD GRUNEWALD
Assistant U.S. Attorney

To:
ALBERT J. KRIEGER, ESQ.
401 Broadway, N.Y., N.Y. 10014
ROBERT KASANOF, ESQ.
52 Broadway, N.Y., N.Y. 10004
FRANK SERRANO, Appellant
U.S. Penitentiary
Lewisburg, Pennsylvania

Affidavit of Raymond Bernhard Grunewald in Support of Motion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

64 CR 456

UNITED STATES OF AMERICA,

Appellee,

—against—

RALPH SANTANA, also known as Reuben Nova, "Red" Nova, Ralph Nova, and Rafael Salsano; LIONEL MARQUEZ, also known as "Chilli" Marquez; FRANK SERRANO; ELIZA ROSARIO, also known as Lisa Marquez; LILLIAN SANTANA, also known as Lillian Nova, Margie Moore and Lillian Lequerique,

Appellants.

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss.:

RAYMOND BERNHARD GRUNEWALD, being duly sworn, deposes and says:

I am an Assistant United States Attorney, Eastern District of New York, duly appointed according to law and acting as such, and represent the United States of America in connection with the above-captioned appeal.

This affidavit is made in support of a motion to dismiss the appeals, in the above-entitled action, for appellants' failure to docket the record on appeal and to otherwise diligently prosecute and perfect their appeal in this Court.

Appendix B—Affidavit of Raymond Bernhard Grunewald in Support of Motion

On the 31st day of December 1964 the appellants were indicted for violations of §174, Title 21, U.S.C. and §4704(a), Title 26, U.S.C., for their participation in an international narcotics importation ring. Ten months later, rather than stand trial, on the 28th day of October 1965, before Judge Joseph C. Zavatt, appellants Ralph Santana, Lionel Marquez and Frank Serrano entered pleas of guilty to a violation of §174, Title 21, United States Code, thereby admitting their participation in the narcotics importation conspiracy, and appellants Elisa Rosario and Lillian Santana were permitted to enter pleas of guilty to violations of §4704(a), Title 26, U.S.C., the so called "tax stamp" violation, whereby they admitted their participation in the importation of some twenty-two pounds of narcotics on a single occasion.

On the 17th day of February 1966, appellants appeared before Judge George Rosling for sentence. Appellant Ralph Santana, a second narcotics offender, upon hearing his sentence to 15 years imprisonment, sought to withdraw his guilty plea. No legal basis for such an action was proffered. The Court refused to honor this oral motion and directed that, if made at all, it be made in writing. The other appellants followed suit, seeking to either adjourn their sentences or withdraw their guilty pleas, with the same negative result. They were sentenced. The other sentences were as follows:

Lionel Marquez — 10 Years
Frank Serrano — 8 "
Eliza Rosario — 4 "
Lillian Santana — 4 "

Appendix B—Affidavit of Raymond Bernhard Grunewald in Support of Motion

All of the appellants are presently serving their sentences. No application for bail was ever made. With the exception of appellant Frank Serrano, who has thrice moved for reduction of sentence and whose request has been thrice denied, none of the appellants have sought any action or relief by motion in the District Court. It appears unlikely that any further motions will be made.

On the 28th day of February 1966, appellants had filed notices of appeal. More than sixty-three days have elapsed since the return date of this motion, the record on appeal has not been filed, and the appeal has not been docketed in the Court pursuant to Rule 14 of the rules of this Court and Rule 39, Federal Rules of Criminal Procedure.

This motion is accompanied by a certificate from the Clerk, United States District Court, Eastern District of New York, certifying that the notices of appeal in this matter were duly filed and that nothing has been done to perfect the record on appeal since the notices of appeal were filed.

WHEREFORE, the United States of America, appellee, respectfully prays that this Court, by its Clerk, enter an order dismissing appellants' appeal.

RAYMOND BERNHARD GRUNEWALD
Assistant U.S. Attorney

(Sworn to on April 14, 1966.)

Clerk's Certificate Annexed to Affidavit of Raymond Bernhard Grunewald

EASTERN DISTRICT OF NEW YORK, ss.:

I, LEWIS ORGEL, Clerk of the United States District Court, Eastern District of New York, do hereby certify that an examination of the Docket record of the case entitled United States v. Ralph Santana; Lionel Marquez; Frank Serrano; Eliza Rosario and Lillian Santana, Criminal No. 64 CR 456, fails to disclose that anything was done to perfect the record on appeal since the filing of Notices of Appeal on February 28, 1966, nor was any extension of time to file said record granted by this Court, or that any record of appeal was in fact forwarded to the Court of Appeals.

IN TESTIMONY WHEREOF, I have caused the Seal of said Court to be hereunto affixed, at the Borough of Brooklyn, in the Eastern District of New York, this 14th day of April in the year of our Lord one thousand nine hundred and sixty-six, and of the Independence of the United States the one hundred and ninetieth.

Dated: Brooklyn, N.Y.
April 14, 1966

LEWIS ORGEL
Clerk

By: .....
Deputy Clerk

APPENDIX C

Affidavit of Albert J. Krieger and Robert Kasanof

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

RALPH SANTANA, LIONEL MARQUEZ, FRANK SERRANO, ELIZA ROSARIO, LILLIAN SANTANA,

Appellants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALBERT J. KRIEGER and ROBERT KASANOF, both being duly sworn, depose and say as follows:

That Robert Kasanof represents Eliza Rosario and Lillian Santana and that Albert J. Krieger represents Ralph Santana and Lionel Marquez.

That on April 20, 1966, Albert J. Krieger received a letter from Frank Serrano inquiring as to these proceedings and that he does appear on behalf of Serrano also, at least insofar as this motion is concerned.

That it is the intention of all of the defendants to prosecute the appeals from the judgments entered by Judge Rosling on February 17, 1966. That the record on appeal

will be docketed, if the Court permits, within ten days and briefs will be filed within thirty days thereafter.

This is not merely a matter of appeal from a judgment imposed after a guilty plea. While it is quite correct as the Government alleges that no legal basis was offered in support of a motion to withdraw any of the guilty pleas, not half the story is told. Judge Rosling refused to hear any argument or to entertain the applications.

The pleas of guilty in this case were entered after months of negotiation between counsel for the defendants and the United States Attorney's office. These negotiations resulted in a promise that the Department of Justice would recommend to the sentencing Court that the sentences imposed upon each defendant not exceed a specific number of years as to each defendant. At the time of the entry of the plea, the Government stated to Chief Judge Zavatt (the Judge in front of whom the pleas were entered), that it would make certain recommendations as to sentence. Judge Rosling disregarded the recommendation of the Government and your deponents assume that a recommendation was made.

No legal verbiage nor fine adherence to legal formalism at the time of entry of a plea of guilty can divorce the plea itself from the Government's recommendation as to sentence and the inducing effect of that recommendation.

It is respectfully submitted that the relatively bizarre circumstances of this case require full brief and legal expression in order to safeguard the fair administration of justice.

Appendix C—Affidavit of Albert J. Krieger and Robert Kasanof

At heart our position is this: We believe our clients have been done a legal injustice. It is not clear to us whether the appropriate remedy is by motion under Section 2255 of Title 28, United States Code, Rule 32 (d) or Rule 35 of the Federal Rules of Criminal Procedure. By allowing us the time requested, we will be able to make our determination and proceed accordingly, after being able to confer with our clients who are incarcerated in Pennsylvania, West Virginia, and Georgia.

WHEREFORE, it is respectfully prayed that the motion to dismiss the appeals hereunder be denied, and for such other and further relief as to the Court may seem just and proper.

/s/ ALBERT J. KRIEGER
/s/ ROBERT KASANOF

Sworn to before me this
28th day of April, 1966.

/s/ MARLENE SEITELMAN
Commissioner of Deeds
#4-727 City of New York
Certificate filed in New York County
Term Expires June 29, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 306

RALPH SANTANA, LIONEL MARQUEZ, FRANK SERRANO, ELIZA ROSARIO, LILLIAN SANTANA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the order of the Court of Appeals for the Second Circuit (Pet. App. 5-6) dismissing their appeals for want of prosecution.

As appears from the affidavit of the Assistant United States Attorney, annexed to the government's motion to dismiss the appeal (Pet. App. 9-12), on October 28, 1965 the male petitioners pleaded guilty to an indictment charging them with conspiracy to import narcotics in violation of 21 U.S.C. 174, and the female petitioners to violations of 26 U.S.C. 4704

(a). On February 17, 1966, each was sentenced to a term of imprisonment (Pet. 10). The sentences imposed were higher than those recommended by the United States Attorney (see Pet. 2, 3). Petitioner Santana, on hearing his sentence, sought to withdraw his guilty plea without proffering any legal basis for such motion. The district court refused to honor the oral motion and directed that, if the motion were to be made, it be in writing. The other petitioners then sought either to adjourn their sentencing or to withdraw their guilty pleas, but the district court proceeded with the sentencing (Pet. 10).

Petitioners filed a notice of appeal on February 28, 1966 (Pet. 12). Nothing was done to perfect the appeal within the 40-day period fixed by Rule 39(c), F.R. Crim. P., nor was an extension of time sought to file the record on appeal (Pet. 12).* On April 14, the government made a motion, returnable more than two weeks later (on May 2, 1966), to dismiss the appeal for lack of prosecution (Pet. 7-8). In opposition to the motion, petitioners' counsel stated that, if the court permitted, petitioners would docket the appeal within ten days and file briefs within 30 days thereafter. Their affidavit set forth the fact that the judge had failed to follow the recommendations of the United States Attorney with respect to sentence (Pet. 14). They then stated that "it is not clear to us whether the appropriate remedy is by motion under Section 2255 of Title 28, United States Code, Rule

* Petitioners filed no written motions to withdraw their guilty pleas, although Serrano moved for reduction of sentence (Pet. 11).

32(d) or Rule 35 of the Federal Rules of Criminal Procedure. By allowing us the time requested, we will be able to make our determination and proceed accordingly, after being able to confer with our clients who are incarcerated in Pennsylvania, West Virginia, and Georgia" (Pet. 15). The court of appeals dismissed the appeal for lack of prosecution (Pet. 5-6).

There is no occasion for further review by this Court. Petitioners failed to offer any adequate excuse for their failure to perfect the appeal; counsel had ample time after sentencing on February 17 to decide on their course of action, even before the notice of appeal was filed. Certainly, in the period after appeal was noted, they were in a position to determine whether to proceed with the appeal. Moreover, petitioners have signally failed to show that the appeal would present any issue of merit. Admittedly, it was made clear to them before they pleaded guilty that the recommendations of the United States Attorney would not be binding on the judge. The mere fact that a defendant is disappointed in the sentence imposed plainly does not justify withdrawal of his guilty plea. *United States* v. *Marcus*, 213 F. 2d 230 (C.A. 7), certiorari denied, 348 U.S. 824; *Williams* v. *United States*, 192 F. 2d 39 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JULY 1966.

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